NO. 47890-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

TYLER DAVID ROBB, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-00868-6

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

RACHAEL R. PROBSTFELD, WSBA #37878
Senior Deputy Prosecuting Attorney
OID No. 91127

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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STATEMENT OF THE CASE

Tyler David Robb (hereafter 'Robb') was charged by Information with Rape of a Child in the Second Degree and Child Molestation in the Second Degree for an incident that occurred involving his stepdaughter, D.I.A., at their family home in Ridgefield, Washington on April 28, 2014. CP 5-6. At trial, the State presented testimony from D.I.A., her mother, Shannon Robb, their neighbor, Angela Gariano, the emergency room doctor who saw D.I.A. the day of the incident, Dr. Kathleen Myers, the emergency room nurse and sexual assault nurse examiner, Kelly Brady-Pavelko, and a forensic DNA analyst from the Washington State Patrol Crime lab, Brad Dixon. RP 93-128, 155-98, 216-36, 286-356, 370-80, 392-405. Robb presented testimony from the neighbor, Angela Gariano,

and he testified in his defense. RP 414-47. During trial, the court held a *Frye* hearing prior to admitting any evidence from the forensic scientist regarding DNA testing, at Robb's request. RP 202-14. The trial court allowed admission of DNA evidence. RP 214. After deliberations, the jury convicted Robb of Rape of a Child in the Second Degree and Child Molestation in the Second Degree. CP 54-55. Robb was sentenced on August 5, 2015. CP 63-82. Robb and the State agreed his crimes constituted "same criminal conduct" for scoring purposes and the trial court based Robb's standard range off of an offender score of '0.' RP 534-35, 543; CP 65. The trial court imposed a mid-range sentence. CP 66. Robb's appeal timely follows. CP 83.

At trial the evidence showed that D.I.A. lived in Ridgefield, Washington, at 3502 NE 16th Street, with her mom, two brothers and her step-father, Robb. RP 93, 178. D.I.A. was born on April 2, 2001. RP 106. D.I.A. has never been married. RP 119. D.I.A. had known Robb since she was 4 years old and always considered him her dad. RP 94. Shannon Robb (hereafter 'Shannon')[1] married Robb on September 8, 2006. RP 177. D.I.A. is Shannon's biological daughter. RP 178. Shannon has another son, E., and she shares a child in common with Robb, their son G. RP 178. By January 2014, Robb and Shannon's marriage had broken down and

[1] The State intends no disrespect in referring to Ms. Robb by her first name, but does so for purposes of clarity and ease of reading.

they were planning on divorcing. RP 177. In April 2014, they were still all living together, but their intent was to soon divorce and live separately. RP 178-79.

On April 28th when D.I.A. was 13 years old, her "life changed forever" because she was "raped by [Robb]". RP 95. That morning, D.I.A. stayed home from school sick as she had been diagnosed with strep throat and was not feeling well. RP 95, 182. Shannon left home at about 4 to 4:30 a.m. to go to her job at Crestview in Portland, Oregon. RP 179-80. Robb told D.I.A. she could watch TV in his room that morning. RP 95. D.I.A. was home with Robb and her two brothers. RP 96. D.I.A. laid in Robb and her mom's bed to watch TV. RP 97. Robb came into the bedroom and laid down next to her, very close. RP 97. Robb then put his hand on D.I.A.'s stomach. RP 98. She was wearing pajama pants and a shirt. RP 98. From her stomach, Robb then moved his hand underneath her pajama pants and her underwear. RP 98. While Robb was touching her he asked D.I.A. if she wanted this. RP 98. Robb's finger then reached up D.I.A.'s vaginal area and she was "fingered." RP 99. D.I.A. told him to "please stop." RP 99. Robb stopped. RP 99. Prior to getting out of the bed, Robb touched D.I.A.'s breast. RP 99-100. Robb then got out of the bed and got ready for work. RP 100. D.I.A. was too scared to get out of the bed, so she remained where she was. RP 100. Robb got D.I.A. a bowl of

cereal and then left for work. RP 101. As soon as Robb left for work, D.I.A. sent her mother a text message. RP 101. The text message was sent at 7:02a.m. on April 28th, 2014. RP 102. In the text message, D.I.A. said to her mother, "I don't feel safe with Dad." RP 102. Shannon received that text message while she was at work. RP 180. Shannon responded telling D.I.A. to call her. RP 181. Shannon testified that D.I.A. called her within minutes. RP 181. D.I.A. testified that her mom called her. RP 101. During the phone call, D.I.A. was crying and emotional; she sounded scared, and was so upset Shannon could barely understand her. RP 181. D.I.A. was able to communicate that her father had assaulted her. RP 183. Shannon told D.I.A. to take her brothers and go to the neighbor's house. RP 101. Shannon left work in Portland and headed north back to Ridgefield, calling the police on her drive. RP 184. D.I.A. went over to her neighbor, Angela Gariano's house, with her brothers. RP 103. As D.I.A. went to the neighbors' house on April 28, 2014, she felt shocked and terrified; she was crying. RP 105.

Ms. Gariano lived next to D.I.A. and her family for approximately three years and got to know the family. RP 156. Ms. Gariano's children were friends with D.I.A. and her brothers. RP 157. Typically, Ms. Gariano would watch D.I.A.'s two brothers, E. and G., every morning before school because both of D.I.A.'s parents had to go to work. RP 157.

Usually D.I.A. would drop her two brothers off at Ms. Gariano's house and then go to her bus. RP 157. Ms. Gariano typically saw D.I.A. every morning as she dropped her brothers off and say hi. RP 158.

On the morning of April 28, 2014, D.I.A. came over to Ms. Gariano's house, however D.I.A. was very different that morning. RP 158. D.I.A. was crying hysterically, her face was red and blotchy and she was clearly "very, very upset." RP 158. Ms. Gariano hugged her and D.I.A. sobbed. RP 159. Ms. Gariano took the two boys into the other room to sit with her children who were watching TV, and then sat D.I.A. down on the couch in a different room and spoke to her. RP 159. D.I.A. told Ms. Gariano that her "dad did something bad to [her]." RP 159. Ms. Gariano asked D.I.A. if her dad had hit her and D.I.A. said no. RP 159. She then asked if her dad had touched her and D.I.A. said "yes," and indicated to Ms. Gariano that her dad had touched her on her breast and vagina, by saying "he touched me here and here" while putting her hand on her breast and vagina. RP 159-60. After that Ms. Gariano just held D.I.A. while she cried. RP 160.

Shannon, called Ms. Gariano and Ms. Gariano told Shannon that she needed to call the police. RP 160. Shannon said she already knew and she had already called the police. RP 160. D.I.A. stayed at Ms. Gariano's house for approximately 30 to 45 minutes until D.I.A.'s mother arrived.

RP 160-61. D.I.A. cried the entire time she waited. RP 161. When Shannon arrived at Ms. Gariano's house, D.I.A. was sitting on the couch and appeared to be very upset; she was crying and shaking. RP 184. Shannon went to her and hugged her; D.I.A. would not stop crying and would not let go of Shannon. RP 184. Ms. Gariano watched as Shannon ran into the house and dropped to her knees in front of D.I.A. and told her she loved her; D.I.A. was hysterical. RP 161.

Shannon then walked her daughter back to their house, next door. RP 185. D.I.A. was still visibly upset. RP 185. D.I.A. then told her mom that Robb said she could watch TV in their bedroom and that he laid down with her and began kissing her. RP 185. D.I.A. said her dad put his hand down her pants and up her shirt and asked her if this is what she wanted. RP 185. After waiting for a little while, Shannon took D.I.A. to a police station because the police had not yet arrived at her house. RP 120, 161-62, 186.

At the police station, Shannon and D.I.A. spoke to Detective Beth Luvera. RP 120, 187. Detective Elizabeth Luvera has been a law enforcement officer for nearly 20 years. RP 309. In April 2014 she worked for the Clark County Sheriff's Office as a deputy sheriff. RP 310. On that date, Det. Luvera was assigned to work the desk at West Precinct, and Shannon and D.I.A. came into the precinct to report the incident that had

occurred that morning. RP 311-12. Det. Luvera spoke briefly with Shannon and D.I.A. and then asked to speak with D.I.A. alone. RP 313. She interviewed D.I.A. alone in a conference room at the precinct. RP 313. . Shannon then took D.I.A. to Legacy Salmon Creek Hospital where she underwent a medical examination. RP 187-88. After that, Shannon sent D.I.A. to her grandmother's house and Shannon returned to the house she shared with Robb to gather up her and her children's belongings. RP 188. Shannon collected their belongings and left the house, but then decided to return for D.I.A.'s backpack. RP 188. While approaching the house, Shannon saw Robb. RP 188. Shannon called the police. RP 188, 314. Robb then text messaged Shannon and asked her where the children were. RP 188. Shannon lied to Robb and said the children were with her mom and sister and that she was still at work. RP 188-89. Robb replied to her that he was still at work. RP 189. Shannon watched for approximately 20 minutes while Robb paced back and forth and then left the house. RP 189. Shannon then went back into the house and got D.I.A.'s backpack and went to her mother's house. RP 189. At that point it was approximately 5:30 or 6p.m. and D.I.A. was very tired and lethargic and wanted to go to bed. RP 190. Shannon helped police apprehend Robb by communicating with him and convincing him to go back to the house where police arrested him. RP 197-98, 314.

After Shannon called about Robb's location, Det. Luvera sent patrol officers to wait in the area until Robb arrived and asked that they take him into custody. RP 188, 314-15. Deputy Luque of the Clark County Sheriff's Office brought Robb to West Precinct where he and Det. Luvera proceeded to interview him. RP 316. Det. Luvera recorded the interview with Robb's permission. RP 316. A redacted version of the interview was played for the jury. RP 316-42. Robb told deputies that, as D.I.A. laid in bed he put his hand inside her pajama bottoms and touched her vagina. RP 334-36; 338.

At the hospital, D.I.A. was examined by a doctor and nurse in the emergency room, on the same day as the incident. RP 121, 287-88. Dr. Kathleen Myers is an emergency room physician at Legacy Salmon Creek Hospital in Vancouver, Washington. RP 286. On April 28, 2014, Dr. Myers examined and treated D.I.A. as a patient. RP 287-88. D.I.A. was very distraught. RP 288. As part of her examination, Dr. Myers asked D.I.A. why she was there that day and what had made her so upset that morning. RP 291. D.I.A. said she felt unsafe at home and that her stepdad had kissed her and fondled her breasts. RP 291. When Dr. Myers asked specific questions about further touching, D.I.A. became very upset and would not talk anymore. RP 292. Dr. Myers then performed her physical exam of D.I.A. which included pulse, blood pressure, looking at her

throat, listening to her heart, and doing a pelvic exam. RP 289; 292-93. The pelvic exam consists of looking for trauma, collecting evidence, and testing for gonorrhea and chlamydia. RP 293. D.I.A. was too upset to tolerate a speculum examination, but did allow Dr. Myers to visualize the external genitalia. RP 294; 302. Dr. Myers did observe an area of redness or irritation to the posterior fourchette, which is the base of the vaginal canal. RP 295. This type of redness or irritation can be caused by irritation, scratching, or trauma. RP 296. Dr. Myers considered this to be an abnormality of D.I.A.'s genitalia. RP 297. After the physical examination, D.I.A.'s mom stepped out of the room and Dr. Myers spoke further with D.I.A. RP 297. At this time Dr. Myers asked D.I.A. more questions and D.I.A. disclosed that Robb put his fingers in her. RP 297. Dr. Myers testified that digital penetration could cause redness or irritation to the genitalia, consistent with what she observed of D.I.A.'s genitalia. RP 298. A sexual assault kit was used by the nurse involved in D.I.A.'s examination that involved collecting swabs for evidence. RP 303-04.

Kelly Brady-Pavelko is a sexual assault nurse examiner at Legacy Salmon Creek Hospital, and was working in that capacity on April 28, 2014. RP 370-71. Ms. Brady-Pavelko saw D.I.A. on that date and remembers D.I.A. was tearful the entire time she had contact with her. RP 373. Ms. Brady-Pavelko followed her protocol in completing a sexual

assault examination evidence kit, and collected potential evidence during her examination of D.I.A. RP 374, 393. This evidence included a swab of D.I.A.'s left breast. RP 393.

Brad Dixon, a supervising forensic DNA scientist at the Washington State Patrol Crime Laboratory, testified at trial. RP 216-36, 399-405. He explained to the jury that DNA is the genetic material within each person that makes them unique. RP 218. No two people have the same DNA except for identical twins. RP 218. A DNA profile consists of a collection of information obtained from specific areas of the DNA. RP 218. After creating a DNA profile, scientists compare that profile to a profile created from a known sample. RP 221. A known sample typically comes from a cheek swab or a particular individual. RP 221. A Y-STR profile is a DNA profile that is developed from the Y chromosome. RP 223. All males in the same biological lineage have the same Y chromosome. RP 223-24. Once a DNA profile is developed, Mr. Dixon then interprets the results by comparing the evidence sample to the known sample. RP 224. In comparing the profiles, Mr. Dixon determines whether the known individual could be a contributor to the evidence DNA sample, or if they can be excluded as a potential contributor. RP 224.

Regarding this case, Mr. Dixon received a sexual assault evidence collection kit with samples from D.I.A., including vaginal swabs, labia

swabs, anal swabs, oral swabs, left breast swabs, and a pair of underwear. RP 225. Of those samples, all contained DNA, but only one swab detected male DNA. RP 226. The one swab which contained male DNA came from the left breast swab. RP 226. Mr. Dixon was able to obtain a partial Y-STR profile from the left breast swab. RP 227. Upon comparing this profile to the profile he generated from a known sample of Robb's DNA, Mr. Dixon could not exclude Robb or any of his paternal male relatives as a donor of the particular DNA profile obtained from the left breast swab. RP 227. Mr. Dixon then compared this DNA to a database of known Y-STR profiles and determined that one in nine male individuals in the U.S. population has this DNA profile. RP 228.

The partial profile that Mr. Dixon was able to obtain from the left breast swab contained four out of seventeen possible observable locations on the DNA. RP 229. There is a point in DNA profiling where there are not enough locations observed to create a comparison. RP 229. Mr. Dixon was able to make a conclusion in this case, however. RP 230.

Mr. Dixon tested for amylase, which is an enzyme that is present at high amounts in saliva, and found no amylase in the breast swab. RP 235. Based on the results of his testing, the DNA present on the breast swab most likely was a result of the transfer of skin cells. RP 235. Shedding of skin cells happens on a daily basis and "transfer events," like friction, can

help to shed particular skin cells. RP 236. Mr. Dixon was unable to say how the DNA got on D.I.A.'s breast, only that the partial profile Y-STR DNA he developed was found on D.I.A.'s breast. RP 236.

Robb testified in his defense. RP 417-48. He testified that things in his marriage were "rocky" and he filed for divorce from Shannon in March 2014. RP 418. He intended to have full custody of his biological son, G., after the divorce. RP 419.

On the morning of April 28, 2014, he followed his usual routine of waking up about 5a.m., made coffee, got ready for work, got D.I.A. and the boys up and ready for school. RP 420-21. D.I.A. informed him she would not be going to school that morning. RP 421. D.I.A. went downstairs for a short time and then came back upstairs and went and laid down in the master bedroom where there was a big screen TV. RP 423. Just before he left for work, Robb testified that he went into the master bedroom to say bye to D.I.A., sat on the edge of the bed and gave her a hug and told her to give him a call when she got up later. RP 424. Robb denied touching D.I.A. on her vagina, or her breasts, and denied inserting his finger into her vagina. RP 424.

Robb admitted it was his voice on the recording with Det. Luvera, but testified he did not remember any of the interview with police until it was played for him. RP 432. He testified that he did not know why he

answered Det. Luvera's questions the way he did, but that when he told her he touched D.I.A. underneath her clothes and on her vagina that that was false. RP 433. Robb said he had no idea why he did not deny touching D.I.A. on her vagina during his conversation with Det. Luvera. RP 444.

At Robb's request during trial, the trial court held a *Frye* hearing prior to admitting at DNA evidence collected in this case. RP 202-15. The State presented the testimony of Brad Dixon, a supervising forensic DNA scientist at the Washington State Patrol Vancouver Crime Laboratory. RP 202-12. For purposes of the *Frye* hearing, the trial court heard that Mr. Dixon received his Bachelor's of Science from the University of Georgia and his Master's of Science in forensic science from the University of Alabama. RP 203. He performs DNA case work in the State Patrol crime lab and supervises other forensic scientists. RP 202. Mr. Dixon has previously done DNA work in Georgia, for the Oakland Police Department, the Santa Clara County district attorney's crime laboratory, and for a private firm that made forensic DNA testing products. RP 203. Mr. Dixon receives ongoing training and is familiar with current publications and studies as it relates to DNA profiles and comparisons. RP 206.

Mr. Dixon explained to the court that DNA is "genetic material inside each one of our bodies which make us unique from one another. As

it relates to forensic science as a whole, half of your DNA is from your mother, half is from your father. And no two people have the same DNA profile, except for identical twins." RP 204. There is a method of developing a DNA profile off of a Y chromosome called a Y-STR profile. RP 204-05. The Y-STR DNA profile procedure is widely accepted in the scientific community. RP 205-06. There are 17 specific locations on the Y chromosome that scientists look to in generating a DNA profile. RP 210. Mr. Dixon was able to detect four of the seventeen areas on the Y chromosome in the DNA sample obtained in this case. RP 210.

Forensic scientists are able to detect "very, very minute quantities of DNA." RP 207. Some of these quantities may not be sufficient to develop a full or partial DNA profile. RP 207. The type of comparison a forensic scientist is able to make depends on how much DNA they are able to obtain. RP 207.

Once a forensic scientist has developed a full or partial DNA profile, he or she compares that profile to a known reference sample from a particular individual. RP 208. The comparison could yield one of three results: the known person could be included as a possible contributor of the DNA sample, he/she could be excluded as a possible contributor, or the result could be inconclusive. RP 208. If the result shows the known person could be included as a potential contributor then the scientist

develops a statistic which provides an estimation for the occurrence of that particular profile in the general population. RP 209. For the Y-STR DNA profile, there is a database which houses profiles and compares a DNA profile to the database to determine if that profile has been observed in the U.S. population; the software then generates an estimate of that particular profile in the general population. RP 209.

The trial court ruled that the testing procedure used by Mr. Dixon was accepted in the scientific community and that the procedure was not novel or unusual, but rather was widely accepted and used in the scientific community. RP 214. The trial court further found that Mr. Dixon has the expertise to talk about the methodology and results of his testing, and has specialized knowledge that would assist the trier of fact. RP 214. The trial court ruled that any challenges to Mr. Dixon's opinions would go to weight and not admissibility. RP 215. The trial court allowed the Y-STR DNA evidence to be admitted at trial pursuant to ER 702. RP 214.

During trial the State moved to admit statements D.I.A. made to the ER physician who examined her at the hospital the day of the incident under ER 803(a)(4), as statements made for the purpose of medical diagnosis or treatment. RP 273-74. Robb objected to the admission of these statements and argued they were not pertinent to medical diagnosis or treatment as the doctor did not prescribe medication or give any

treatment to D.I.A. RP 275. The trial court found these statements would be admissible under ER 803(a)(4). RP 277.

Prior to the witnesses testifying, the court engaged in a colloquy with the parties regarding the admissibility of statements D.I.A. made to the neighbor, Ms. Gariano, and her mother, Shannon, as excited utterances pursuant to ER 803(a)(2). RP 141-46. The trial court understood the State proposed admission of these statements as excited utterances under ER 803(a)(2), and the trial court discussed that the State needed to meet three requirements prior to admission: 1) that a startling event or condition occurred, 2) that the declarant made the statement while under the stress of excitement of the startling event or condition, and 3) that the statement related to the startling event or condition. RP 144-45. During Ms. Gariano's testimony, Robb objected to admission of statements D.I.A. made to Ms. Gariano, and the trial court overruled that objection, allowing admission of the statements. RP 159. During Shannon's testimony, Robb objected to admission of statements D.I.A. made to Shannon, and the trial court overruled that objection, allowing admission of the statements. RP 185.

The State's closing argument consists of 19 pages of transcript. RP 469-88. The rebuttal consists of 13 pages of transcript. RP 505-18. Robb

has alleged error involving certain parts of the State's argument including the following passages:

> The defendant is presumed innocent, we talked about that at the time of jury selection, throughout the entire unless during your deliberations, you find it's been overcome by the evidence beyond a reasonable doubt. A reasonable doubt, then, is one for which a person or—I'm sorry—is one for which a reason exists and may arise from the evidence or lack of evidence; it is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.
>
> Do you have an abiding belief that the testimony you heard from [D.I.A.] was accurate as to what happened? Do you have an abiding belief that the testimony about the observations made by the neighbor, Angela, by [D.I.A.]'s mother, Shannon, by [D.I.A.]'s treating emergency department physician, Dr. Myers, and the nurse, Kelly Brady-Pavelko, and the WSP lab scientist who did the tests on the DNA; do you have an abiding belief that the evidence proves what happened in this case? If so, this defendant is guilty beyond a reasonable doubt as to Count 1 as well Count 2.

RP 487-88. Robb did not object to this argument.

The prosecutor argued during her rebuttal:

> And the notion that this is some sort of really, like I said, elaborate hoax, you would have to belief first, that [D.I.A.] managed to become infected with strep throat on a Friday so that she could stay home on a Monday that happened to be a day or two prior to when [Robb] was planning to leave, that subsequently, she was going to be asked to memorize facts and details about an incident that never actually took place, and she was supposed to have those encoded so easily in her memory that she could then repeat them to a neighbor, and then to a treatment provider and then to a detective; that she

> was able to retain and be consistent and tell the same lie that she had been forced to memorize over and over again.

RP 511. Robb objected and the trial court sustained the objection and told the jury: "So I'll go ahead and sustain the objection. I'll go ahead and strike any references to what a person may or might have said as opposed to what the evidence is." RP 511-12. The Court further stated, "Jury disregard anything that was evidence presented during the trial." RP 512.

The prosecutor also stated in her rebuttal argument:

> The fact that we're talking about a small amount of DNA of the—that yields a partial—YSTR profile being found on her breast, isn't all that unusual. Of all the areas where you would think it might be more likely many hours later to still find DNA in place, it's more likely to be on her breast, frankly. It's not inconsistent at all that that's where you'd find that trace amount. That trace amount that yielded a result that really only is this big out of a potential result that could be this big. That's all that is. But, again, that's the piece of the puzzle that it is.

RP 510. Robb did not object to this argument. RP 510.

ARGUMENT

I. The trial court properly admitted DNA evidence.

Robb argues the trial court erred in admitting the DNA evidence the State presented. Robb specifically argues that the methodology the forensic analyst used to detect a partial profile of the Y-STR DNA in this case is not generally accepted in the scientific community, and that further this evidence was not helpful to the jury and should have been excluded

under ER 702. Y-STR DNA testing is widely and generally accepted in the scientific community, as are partial profile results. The DNA evidence at trial showed that Robb could not be excluded as a contributor of the DNA found on D.I.A.'s breast, thus this evidence was relevant and the forensic analyst's testimony was helpful to the jury. Robb's argument the trial court erred is without merit.

Ordinarily, a trial court's determination under a *Frye* hearing is reviewed *de novo*. *State v. Kunze*, 97 Wn.App. 832, 854, 988 P.2d 977 (1999), *rev. denied*, 140 Wn.2d 1022, 10 P.3d 404 (2000). Here, the trial court was overly cautious in conducting a *Frye* hearing as when proposed scientific evidence does not involve novel scientific theories, the trial court need not hold a *Frye* hearing. *State v. Hayden,* 90 Wn.App. 100, 104, 950 P.2d 1024 (1998). As discussed in more detail below, DNA testing has long been widely accepted in the scientific community and our State courts have held that *Frye* hearings are unnecessary in decisions regarding admission of DNA testing evidence. *See e.g., State v. Gentry*, 125 Wn.2d 570, 586, 888 P.2d 1105 (1995). However, the admission of DNA evidence is still subject to other rules of evidence, including ER 702. This Court should analyze Robb's claim of error under an abuse of discretion standard for the admission of evidence pursuant to ER 702 because the trial court correctly determined that DNA testing in general

has long been accepted by the scientific community and that Y-STR testing is similarly well accepted, thus obviating the need for a *Frye* determination. Robb's claim of error more accurately attacks alleged failures of the specific analyst involved in his case while performing this well-accepted technique. Such a claim of error should be reviewed for abuse of discretion. *See Gentry* 125 Wn.2d at 588 (citing *Kalakosky*, 121 Wn.2d 525, 541, 852 P.2d 1064 (1993); *Cauthron*, 120 Wn.2d 879, 890, 846 P.2d 502 (1993).

ER 702 provides that an expert witness may testify regarding scientific, technical or other specialized knowledge if the testimony or opinion will assist the trier of fact in understanding the evidence or determining a fact in issue. ER 702. Under ER 702, "the trial court has discretion to admit expert testimony if the witness qualifies as an expert and if the expert testimony would be helpful to the trier of fact." *State v. Russell*, 125 Wn.2d 24, 51, 882 P.2d 747 (1994). A trial court abuses its discretion if no reasonable person would take the view the trial court adopted, or if the court's decision was manifestly unreasonable or based on untenable grounds or reasons. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The admission of Brad Dixon's testimony regarding the

DNA evidence in Robb's case should be reviewed for an abuse of discretion as the trial court admitted it under ER 702.

The various forms of DNA testing, including Y-STR testing, are well known and generally accepted in the scientific community. This evidence is in no way novel and does not invoke the *Frye* standard. Evidence derived from novel scientific theories is only admissible if the particular theory has gained general acceptance in the relevant scientific community. *See* ER 702; *State v. Copeland*, 130 Wn.2d 244, 261, 922 P.2d 1304 (1996). In this State, there are two prongs to a *Frye* test for admissibility of scientific evidence: 1) whether the evidence is based upon a theory that is generally accepted in the relevant scientific community, and 2) whether the technique used to implement that theory is also generally accepted by that scientific community. *State v. Cauthron*, 120 Wn.2d 879, 888-89, 846 P.2d 502 (1993). Once a technique has been determined to be generally accepted, the question of whether that technique was correctly performed on a given occasion goes to the weight of the evidence and not its admissibility. *State v. Gentry*, 125 Wn.2d 570, 586, 888 P.2d 1105 (1995) (citing *Cauthron*, 120 Wn.2d at 889; *State v. Kalakosky*, 121 Wn.2d 525, 541, 852 P.2d 1064 (1993)). As long as the scientific community generally accepts both the theory and the technique,

the jury may hear all arguments related to the particular results in that case. *State v. Cauthron,* 120 Wn.2d 879, 889, 846 P.2d 502 (1993).

Our Supreme Court has held that "[t]here is no question that the underlying scientific theory of DNA typing is accepted in the scientific community for identification purposes in the forensic setting." *Gentry*, 125 Wn.2d at 586. Polymerase chain reaction (PCR) variation of DNA testing has been found to be an appropriate technique to implement the theory of DNA identification. *Id.* at 587; *State v. Russell*, 125 Wn.2d 24, 54, 882 P.2d 747 (1994).

In *Shabazz v. State,* 265 Ga.App. 64, 592 S.E.2d 876 (2004), the Court held that the trial court did not err in declining to hold a *Frye* hearing on the admissibility of Y-STR testing because Y-STR testing is simply one specific type of STR DNA testing and STR DNA testing is a PCR DNA system which is generally accepted. *Shabazz*, 265 G.App. at 65. Our Washington Supreme Court has previously held that DNA PCR typing systems are generally accepted in the scientific community and therefore *Frye* hearings on the admissibility of such evidence are no longer necessary. *State v. Gore*, 143 Wn.2d 288, 304-05, 21 P.3d 262 (2001).

In Illinois, their courts have recently held that Y-STR DNA testing is generally accepted in the relevant scientific community. *People v.*

Zapata, 380 Ill.Dec. 646, 8 N.E.3d 1188 (2014). The Court in *Zapata* noted that the California Court of Appeals had recently held that Y-STR testing has gained general acceptance in the scientific community. *Zapata*, 8 N.E.3d at 1193. In *People v. Stevey*, 209 Cal.App.4th 1400, 148 Cal.Rptr.3d 1, 9-11 (2012), the California Court of Appeals stated that Y-STR testing has been generally accepted by the scientific community and it "does not embrace new scientific techniques." *Id.* The Court in California reviewed cases in New Jersey and our State to explain that the basic science of PCR/STR testing and Y-STR testing and the scientific response to these tests are similar. *Id.* In New Jersey, the Court stated that "[t]he analytical procedure followed in Y-STR DNA testing is identical to that followed in autosomal STR DNA testing." *State v. Calleia*, 414 N.J.Super. 125, 148-49, 997 A.2d 1051 (2010), *reversed on other grounds in State v. Calleia*, 206 N.J. 274, 20 A.3d 402 (2011). The *Calleia* court found there "is a general acceptance of Y-STR DNA analysis in the scientific community." *Calleia*, 414 N.J.Super. at 147.

The *Zapata* court also noted that our appeals court has discussed the similarity between PCR/STR testing and Y-STR testing in *State v. Bander*, 150 Wn.App. 690, 208 P.3d 1242 (2009). In *Bander*, Division I stated, "YSTR amplification is essentially the same as the PCR-STR process that [the DNA analyst] used, except that it permits the analysis of

only male DNA in a mixed-source sample that also contains DNA from a female contributor." *Bander*, 150 Wn.App. at 700.

In *Bander*, the defendant was convicted of murder in the first degree. *Bander*, 150 Wn.App at 694. At trial, the State introduced DNA evidence that included PCR-STR testing and Y-STR testing and the results of comparing the defendant's known DNA sample to the DNA profiles from the evidence found at the crime scene. *Id.* at 695-96. One piece of evidence matched the defendant's DNA in every way possible, but other pieces of evidence showed the defendant was excluded as a possible contributor, or were inconclusive, and the Y-STR testing showed the defendant could not be excluded as a possible contributor. *Id.* at 696. On appeal, the defendant challenged the trial court's admission of the DNA evidence arguing that the State's experts' interpretive methods were not generally accepted in the scientific community. *Id.* at 699. In issuing its opinion, the Court of Appeals took the opportunity to discuss the underlying scientific theory of DNA typing and testing methods. *Id.*

The *Bander* Court specifically discussed Y-STR testing. The Court described that Y-STR amplification is "essentially the same as the PCR-STR process..., except that it permits the analysis of only male DNA in a mixed-source sample that also contains DNA from a female contributor." *Id.* at 700. All men from the same paternal lineage have the same DNA

profile at the markers located on their Y chromosomes; Y-STR testing allows a forensic analyst to determine whether a known source and all of his paternal male relatives can be excluded as possible contributors of a DNA sample. *Id.* Division I went on to find that the statistical method the analyst used to interpret the Y-STR results did not warrant a *Frye* hearing prior to admission into evidence. *Id.* at 718. The Court noted in coming to this conclusion that relevant scientific organizations recognized this interpretation method as the acceptable method for interpreting Y-STR results. *Id.*

Furthermore, partial DNA profiles are routinely used by forensic scientists in analyzing evidence for DNA testing and comparison. In Arizona, in *State v. Bigger,* 227 Ariz. 196, 254 P.3d 1142, 609 Adv. Rep. 4 (2011), the defendant argued that DNA evidence based on a "low level" sample was not generally accepted in the scientific community. *Bigger,* 227 Ariz. at 203. The trial court below in *Bigger* received testimony that it is generally acceptable to use established methods to interpret mixtures containing partial results for one of the contributors. *Id.* at 203-04. The appellate court affirmed the admission of this DNA evidence. *Id.* at 208.

At the *Frye* hearing, Brad Dixon, the forensic scientist presented by the State, testified that the methodologies he used in testing the evidence samples and determining a DNA profile were generally accepted

in the scientific community. RP 205-06. Based on the case law discussed above, and the evidence at the *Frye* hearing, it is clear that DNA testing in general is widely accepted by the scientific community. It is further established that Y-STR testing is accepted by the scientific community and a common type of DNA testing that analysts can perform. Robb's claim that Y-STR testing and the results that Mr. Dixon obtained are not generally accepted in the scientific community is meritless. The trial court properly allowed this evidence to be admitted at trial.

As a *Frye* hearing was unnecessary due to the DNA evidence's general acceptance in the scientific community, the trial court properly analyzed the admission of this evidence under ER 702. ER 702 provides that an expert witness may testify regarding scientific, technical or other specialized knowledge if the testimony or opinion will assist the trier of fact in understanding the evidence or determining a fact in issue. ER 702. Under ER 702, "the trial court has discretion to admit expert testimony if the witness qualifies as an expert and if the expert testimony would be helpful to the trier of fact." *State v. Russell*, 125 Wn.2d 24, 51, 882 P.2d 747 (1994). Here, Robb argues the DNA evidence was improperly admitted under ER 702 and that the trial court abused its discretion in admitting this evidence because the DNA sample was very small, only four of seventeen possible loci had been identified in the sample, the

analyst could not conclusively state how the DNA came to be found on D.I.A.'s breast, and the DNA evidence could not rule out Robb's biological son as the contributor as he also lived in the household. Robb argues the DNA evidence's shortcomings means Mr. Dixon's testimony was nothing but speculation. These arguments properly go to the weight a jury should give the DNA evidence, and not its admissibility under ER 702. This evidence was clearly helpful to the jury, and relevant to determining a fact at issue. The trial court did not abuse its discretion in admitting this evidence.

Our Supreme Court has held that questions relating to forensic use of DNA, including reliability of the individual test at issue are matters of weight and not admissibility under ER 702. *State v. Copeland*, 130 wn.2d 244, 273-74, 922 P.2d 1304 (1996). The issues Robb complains of all go to the weight of the DNA results, and not the relevance of the analyst's expertise and the testing he performed. In *State v. Gentry, supra*, our Supreme Court found that arguments regarding the particular testing of the DNA evidence involved in that case went to the weight of evidence and not admissibility pursuant to ER 702. *Gentry*, 125 Wn.2d at 588. In *State v. Leuluaialii*, 118 Wn.App. 780, 77 P.3d 1192 (2003), Division I of this Court stated that "a dispute over the validity of particular procedures generally goes to the weight of the evidence, not its admissibility" in

response to a defendant's argument that the DNA testing procedures were unreliable and should have been excluded as unhelpful under ER 702. *Leuluaialii*, 118 Wn.App. at 788.

By reviewing the case law on the subject of DNA, it is clear that it is common for forensic scientists to be unable to obtain a full DNA profile from crime scene evidence samples and the number of loci identified simply affects the probability statistic developed by the scientists in comparing and interpreting the results. This is the type of argument that goes to weight, not admissibility. The argument Robb makes here is based on his perceived errors or abnormalities in the specific test performed and not on the methods or theories applied. As discussed above, this type of argument does not invoke *Frye*, but instead goes to the weight of the evidence, and not the admissibility. Mr. Dixon's ability to only obtain a partial DNA profile from D.I.A.'s breast swab clearly affected the statistical result he proffered at trial, showing that 1 in 9 men in the United States would be expected to have this same profile. This left plenty for Robb to argue about the significance (ie, the weight the jury should give) of the DNA evidence.

This type of testimony was surely helpful to the jury. This evidence was relevant as it showed there was male DNA located on a part of D.I.A.'s body that she said Robb touched only hours before the

evidence kit was collected. Further, this DNA sample showed that Robb could not be excluded as a source of this DNA, but neither could D.I.A.'s younger brother, or any of Robb's biological male descendants. This evidence clearly met the standards required by ER 702 and the evidence presented allowed both parties to argue what weight the jury should give such evidence. The trial court here soundly exercised its discretion and found that the DNA evidence was admissible under ER 702.

Furthermore, even if this court finds the evidence was improperly admitted, any error was harmless. Erroneous admission of evidence is not grounds for reversal "unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp,* 96 Wn.2d 591, 599, 637 P.2d 961 (1981). The DNA evidence, as discussed above, was not a "match," and no testimony suggested it was. The significant evidence came from D.I.A., her neighbor who observed her hysterical soon after the incident, her mother, and the doctor. The untainted evidence from those witnesses shows any jury would have convicted Robb even without the DNA evidence. Robb was not prejudiced by the admission of the DNA evidence.

II. The trial court properly admitted hearsay statements under ER 803(a)(2) and ER 803(a)(4)

Robb argues the trial court erred in admitting evidence of statements D.I.A. made to the neighbor, her mother, and her doctor under ER 803(a) as exceptions to the hearsay rule. The trial court properly admitted these statements as excited utterances and statements for the purpose of medical diagnosis and treatment. Robb's argument fails.

This Court reviews a trial court's decision to admit a hearsay statement as an excited utterance for an abuse of discretion. *State v. Woods*, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001). A trial court abuses its discretion if no reasonable person would take the view the trial court adopted, or if the court's decision was manifestly unreasonable or based on untenable grounds or reasons. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A hearsay statement is admissible as an excited utterance if the statement was made "while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2); *State v. Thomas*, 46 Wn.App. 280, 283, 730 P.2d 117 (1986). To be admissible as an excited utterance, the trial court must first find that there was a startling event or condition, that the declarant was under the stress of this starting event or condition, and the statement is related to the startling event or condition. *State v. Ohlson*, 162 Wn.2d 1, 8, 168 P.3d 1273 (2007). The trial court should consider many things in coming to its decision, including

passage of time, the declarant's emotional state, and whether the declarant had an opportunity to reflect on the event and fabricate a story. *State v. Williamson*, 100 Wn.App. 248, 258, 996 P.2d 1097 (2000) (citing *State v. Briscoeray*, 95 Wn.App. 167, 173, 974 P.2d 912, *rev. denied*, 139 Wn.2d 1011, 994 P.2d 848 (1999) and *State v. Strauss*, 119 Wn.2d 401, 416-17, 832 P.2d 78 (1992)).

In *Thomas*, *supra*, the trial court admitted statements a rape victim made to her mother about six to seven hours after the complained-of event. *Thomas*, 46 Wn.App. at 284. The Court of Appeals affirmed the admission of these statements as excited utterances, finding that passage of time was not dispositive in the question of whether statements were admissible as excited utterances. *Id.* The Court reasoned that the victim was upset and crying during the statements to her mother, and had spent several hours between the rape and the statement sleeping. *Id.* at 285.

In *State v. Williams*, 137 Wn.App. 736, 154 P.3d 322 (2007), the victim took approximately 20 minutes to shower, put on fresh clothes, and find her cell phone and camera, before walking to her friend's house after being attacked. *Williams*, 137 Wn.App. at 749. The victim called her friend, crying, hysterical and shaking, and made statements relating to the attack. *Id.* The Court found the victim was still under the influence of the event when she made the statements and that "neither the passage of time

nor her attempts to clean herself up following [the defendant's] attack allowed the emotional impact and stress of the kidnap and rapes to abate...." *Id.* As in *Williams*, the short passage of time between the rape and D.I.A.'s disclosures to the neighbor and her mother did not allow D.I.A.'s stress to abate or give her time to fabricate a story.

Robb cites to *State v. Brown*, 127 Wn.2d 749, 903 P.2d 459 (1995) to support his argument that the trial court erred in admitting D.I.A.'s statements as excited utterances because he claims she lied prior to making the statements and thus the statements are not excited utterances. The only "lie" that Robb can point to that he claims shows D.I.A. engaged in "conscious fabrication" prior to making these excited utterances is that she tried to act normal after the rape around Robb and asked him for a bowl of cereal. This is hardly evidence of a lie or fabrication on D.I.A.'s part and only furthers the argument she was under the stress of excitement caused by the rape when she was finally able to get away from Robb and into the safety of her neighbor's house. Many victims face the difficult choice of having a significant reaction in front of their abuser, thus risking harm, or trying to act normally so as to avoid further harm and facilitate their get-away. D.I.A. smartly acted as normally as she could so that Robb would not suspect she would report him to authorities. Once Robb left she immediately talked to her mom on the phone, hysterical, and then went to

the neighbors' house, still hysterical. This is clearly not the type of lie or fabrication the hearsay rule is intended to bar. In *Brown*, the victim fabricated significant details of her attack in the hopes that she would be a more believable victim to the police; she decided to fabricate these details prior to making the statements that were then erroneously admitted as excited utterances. *Brown*, 127 Wn.2d at 758. *Brown* differs so significantly from the facts at hand in Robb's case that *Brown* is not helpful to this Court's analysis.

Here, all the factors supporting admission of D.I.A.'s statements to the neighbor and her mother as excited utterances are met. D.I.A. faced a startling event, the rape by her stepfather; she made the statements soon after she was able to get to a safe place; her appearance was extremely distraught, upset, and hysterical. She clearly made the statements while still under the influence of the rape. There is no evidence the statements were the result of fabrication, intervening actions, or the exercise of choice or judgment. The trial court's finding that these statements were excited utterances is fully supported by the record. The trial court has the discretion to admit these statements when appropriate; furthermore, the trial court is in the best position to judge emotional state and body language of the victim and witnesses, things that cannot be judged from the written record on review.

Robb also claims the statements D.I.A. made to Dr. Myers were improperly admitted as statements for medical treatment or diagnosis. Robb's claim fails as the trial court properly admitted D.I.A.'s statements.

This Court reviews a trial court's decision to admit hearsay statements as statements made for the purpose of medical diagnosis under an abuse of discretion standard. *Woods,* 143 Wn.2d at 602. A trial court abuses its discretion if no reasonable person would take the view the trial court adopted, or if the court's decision was manifestly unreasonable or based on untenable grounds or reasons. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). Under ER 803(a)(4), out-of-court statements may be admitted at trial if statements were made for the purpose of medical treatment or diagnosis. In a sexual assault or domestic violence situation, a disclosure of the identity of the perpetrator is admissible under ER 803(a)(4) because part of reasonable treatment is to prevent recurrence and to promote safety. *See State v. Ackerman*, 90 Wn.App. 477, 482, 953 P.2d 816 (1998); *State v. Sims*, 77 Wn.App. 236, 239, 890 P.2d 521 (1995).

In *Williams, supra*, the trial court admitted statements the victim made to the sexual assault nurse examiner even though the victim testified that she went to the hospital so that evidence could be gathered. *Williams*, 137 Wn.App. at 745. However, the treatment provider, in addition to

gathering evidence, provided the victim with information on sexually transmitted diseases and the risk of pregnancy and asked questions to determine what kind of follow-up would be necessary or helpful. *Id.* at 747.

Similarly to *Williams*, Dr. Myers treated D.I.A. foremost for medical treatment and/or diagnosis. She took a patient history and assessed D.I.A. for injuries, possible sexually transmitted diseases, and other trauma. RP 292-93. Dr. Myers indeed did find an injury to D.I.A.'s genitalia and tested her for gonorrhea and chlamydia. RP 293-97. The statements D.I.A. made to Dr. Myers, and the questions Dr. Myers asked of D.I.A., were reasonably pertinent to medical treatment or diagnosis, they were made for such purpose, and they accomplished this purpose. The trial court properly admitted these statements.

Even if this Court finds the trial court should not have admitted the statements D.I.A. made, any error was harmless. Improper admission of evidence may be harmless error. *State v. Bashaw*, 169 Wn.2d 133, 143, 234 P.3d 195 (2010). The "admission of testimony that is otherwise excludable is not prejudicial error where similar testimony was admitted earlier without objection." *State v. Ramirez-Estevez*, 164 Wn.App. 284, 293, 263 P.3d 1257 (2011) (quoting *Ashley v. Hall*, 138 Wn.2d 151, 159, 978 P.2d 1055 (1999) and citing *State v. Dixon*, 37 Wn.App. 867, 874-75,

684 P.2d 725 (1984) (finding erroneous admission of written statement as excited utterance was harmless error where court had heard same details in victim's testimony)). In *Ramirez-Estevez*, the Court found the admission below of a victim's hearsay statements about a rape to her mother and school counselor was error. *Ramirez-Estevez,* 164 Wn.App. at 292. In analyzing whether the error was harmless, this Court stated, "[b]eing subject to such cross-examination itself diminished, if not extinguished, the type of prejudice that sometimes results from admission of hearsay where the declarant is not subject to cross-examination at trial." *Id.* at 293. The Court found the admission of the victim's statements harmless for reasons that are also present in Robb's case.

Robb had the opportunity to cross-examine D.I.A. As in *Ramirez-Estevez*, the jury was able to watch and listen to D.I.A. and judge her credibility, and her "live testimony in front of the jury eclipsed her earlier consistent recounting of the events" to the neighbor, her mother, and her doctor. *Ramirez-Estevez*, 164 Wn.App. at 293. As in *Ramirez-Estevez*, the jury also got to hear Robb and his version of the events and observe his demeanor and credibility. This Court does "not second guess the jury," and this jury obviously believed D.I.A. and not Robb. *Id.* at 294. Robb has not shown that "'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'"

Bashaw, 169 Wn.2d at 143 (internal quotation marks omitted) (quoting *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001)). This Court should find any error in the admission of out-of-court statements made by D.I.A. to others about the rape was harmless.

III. There was no prosecutorial misconduct and any potential misconduct did not prejudice Robb

Robb alleges the prosecutor committed prosecutorial misconduct during closing argument. The prosecutor did not commit misconduct during closing and if any misconduct did occur, it was cured by the court's instruction, or was not so flagrant and ill-intentioned as to have denied Robb a fair trial. Robb's claim of prosecutorial misconduct fails.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood

that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory,* 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor's comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

In arguing the law, a prosecutor is confined to correctly characterizing the law stated in the court's instructions. *State v. Burton*, 165 Wn. App. 866, 885, 269 P.3d 337 (2012) (citing *State v. Estill*, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972)). It can be misconduct for a prosecutor to misstate the court's instruction on the law, to tell a jury to acquit you must find the State's witnesses are lying, or that they must have a reason not to convict, or to equate proof beyond a reasonable doubt to everyday decision-making. *Id* (citing to *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984), *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996), *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009), and *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008)). Contextual consideration of the prosecutor's statements is important. *Burton*, 165 Wn. App. at 885.

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

> Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's

> misconduct affected the jury verdict, thereby denying the defendant a fair trial.

Davenport, 100 Wn.2d at 762-63.

In Robb's case, any potential misstatement by the prosecutor did not affect the jury verdict. Robb was not denied a fair trial. The closing argument must be taken in the entire context of which it was given. Robb claims the prosecutor alleged facts not in evidence and mischaracterized the role of the jury during her closing argument. The facts Robb claims the prosecutor argued that amount to misconduct include that it was not unusual to have a small DNA sample and that the breast is the most likely place to find DNA hours after touching occurred, and that D.I.A.'s description to Det. Luvera was consistent with her trial testimony. These facts were not admitted at trial. Robb only objected to the argument the prosecutor made with regard to D.I.A. describing the incident consistently to the police, and not with regard to the DNA evidence.

Upon Robb's objection during the prosecutor's closing argument, the trial court sustained the objection and instructed the jury to disregard that argument. The jury is presumed to have followed the court's instruction to disregard. Robb did not further object to the trial court's instruction after sustaining his objection, and did not further request clarification. He now complains this instruction was insufficient, however

he has waived any such argument. Any potential prejudice from the prosecutor arguing D.I.A.'s testimony was consistent throughout this case, including to Det. Luvera, was cured by the instruction the court gave. Any potential prejudice was minimal as there was evidence properly in the record of what D.I.A. told her mother, her neighbor and her doctor the day of the incident and the same day she spoke to Det. Luvera. The jury also saw and heard from D.I.A. during the trial. It was clear from the record that D.I.A.'s testimony was consistent from the first day through the trial. That the prosecutor indicated D.I.A.'s statements to Det. Luvera were also consistent did not overly prejudice the jury. Even if the jury considered this additional evidence, which admittedly was not part of the trial record, it did not have an impact on their verdict.

Similarly, the prosecutor's argument to the jury that having a small DNA sample was not unusual and that the DNA would have remained on her breast was not prejudicial to Robb, and did not impact the jury's verdict. This alleged error must be reviewed for flagrant and ill-intentioned behavior on the part of the prosecutor as Robb did not object. Had Robb objected, the court would have instructed the jury to disregard facts not in evidence. Juries are presumed to follow the court's instructions and therefore Robb would have not been able to be prejudiced as this minor argument that included facts not in evidence was clearly curable

with an instruction to the jury to disregard. Furthermore, the jury was initially instructed by the court that the arguments from the lawyers were not evidence and that they were to disregard any argument that is not supported by the evidence. CP 38. Though the prosecutor argued inferences from the evidence, she did technically tell the jury certain facts that were not testified to. These minor facts did not have an impact on the verdict, however. Robb cannot show prejudice and he cannot show the prosecutor's conduct here was so flagrant and ill-intentioned as to cause an enduring prejudice.

Robb finally argues that the prosecutor mischaracterized the jury's role. Again, Robb did not object to this argument at trial and thus it must be reviewed for flagrant and ill-intentioned misconduct. In this respect, the prosecutor committed no misconduct. The trial court had instructed the jury on the standard reasonable doubt definition which included language about having an "abiding belief." At trial, D.I.A. testified to facts which, if the jury accepted as true, proved the elements of the crimes alleged. The prosecutor argued to the jury that if they had an abiding belief in what D.I.A. said happened, then Robb was guilty beyond a reasonable doubt. This is simply true. There is no misconduct or misstatement or mischaracterization in that argument by the prosecutor. The abiding belief definition has been upheld by our Courts, and is appropriate for the

prosecutor to argue. The prosecutor in no way told the jury it's job was to decide the truth of this case or to decide who was telling the truth. The prosecutor simply said that if they believed the witnesses who established all the elements of the crime, if they had an abiding belief in what they said, then the defendant was guilty. A fair reading of the prosecutor's entire argument shows she was properly arguing the reasonable doubt instruction, and that the jury was the sole judge of the credibility of witnesses, and that if they found the witnesses were credible then they could have an abiding belief in the truth of the charge. This argument was wholly proper. Robb's argument is without merit.

IV. The State agrees the conviction for Child Molestation should be vacated

Robb argues his convictions for rape of a child and child molestation violate double jeopardy. The State does not concede that rape of a child and child molestation are the same offense for double jeopardy, generally. *See State v. Jones*, 71 Wn.App. 798, 824-25, 863 P.2d 85 (1993). However, pursuant to the facts and the arguments made in this particular case, because the State did not clarify the separate offenses in its argument to the jury, the State agrees this Court should vacate the child molestation conviction entered below. As the trial court found the two convictions encompassed the same criminal conduct and did not score the

offenses against each other, this vacation does not affect Robb's sentence. Robb's standard range sentence on the Rape of a Child in the Second Degree conviction should be affirmed.

The remedy for double jeopardy is to vacate the conviction for the lesser offense. *State v. Weber*, 159 Wn.2d 252, 266, 149 P.3d 646 (2006). Rape of a child in the second degree is a class A felony. RCW 9A.44.076(2). Child Molestation in the Second Degree is a class B felony. RCW 9A.44.086(2). The standard range sentence for an offender score of '0' on Rape of a child in the second degree is 78 to 102 months and 15 to 20 months on a child molestation in the second degree. In all ways, child molestation in the second degree is the lesser offense and the one that should be vacated.

V. The trial court properly prohibited Robb from having any contact with minors; this Court should strike the conditions that prohibit Robb from consuming alcohol and viewing or possessing sexually explicit materials.

Robb argues the trial court erred in imposing conditions of his sentence including prohibiting his use of controlled substances, prohibiting the use of sexually explicit materials, and prohibiting contact with his biological child. The State agrees the trial court erred in imposing conditions related to alcohol, controlled substances, and sexually explicit materials. However, the trial court properly prohibited Robb from having

any contact with minors and the trial court should be affirmed in this respect.

Sentencing courts may impose crime-related prohibitions as part of an offender's sentence. RCW 9.94A.700(5)(e). Case law has held that there must be some evidence in the record that the condition in the case is "crime-related." *State v. O'Cain*, 144 Wn.App. 772, 775, 184 P.3d 1262 (2008). The State agrees and concedes there was no evidence in the record of any substance use or use of sexually explicit materials during the commission of the crime. As there is no evidence to support the imposition of these conditions as part of Robb's sentence, these conditions should be stricken from his sentence.

Robb incorrectly argues however that his right to parent his biological child has been unduly restricted. A convict's First Amendment rights "'may be restricted if reasonably necessary to accomplish the essential needs of the state and public order.'" *Riley*, 121 Wn.2d at 37-38 (quoting *Malone v. U.S.*, 502 F.2d 554, 556 (9th Cir. 1974)). Parents do have a fundamental right to raise their children, but parental rights are not absolute and may be subject to reasonable regulation. *State v. Corbett*, 158 Wn.App. 576, 598, 242 P.3d 52 (2010) (citing to *In re Custody of Smith*, 137 Wn.2d 1, 15, 969 P.2d 21 (1998), *aff'd, Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), and *Meyer v. Nebraska*, 262

U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), and *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944)). "Sentencing courts can restrict fundamental parenting rights by conditioning a criminal sentence if the condition is reasonably necessary to further the State's compelling interest in preventing harm and protecting children." *Id.* (citing *State v. Berg*, 147 Wn.App. 923, 942, 198 P.3d 529 (2008), *State v. Ancira*, 107 Wn.App. 650, 654, 27 P.3d 1246 (2001), *State v. Letourneau*, 100 Wn.App. 424, 438, 997 P.2d 436 (2000), *In re Dependency of C.B.*, 79 Wn.App. 686, 690, 904 P.2d 1171 (1995), *rev. denied*, 128 Wn.2d 1023, 913 P.2d 816 (1996)).

In *State v. Berg*, *supra*, the Court on appeal upheld the trial court's prohibition on contact with all minors after the defendant was convicted of rape of a child and child molestation involving a female child he parented, but was not biologically related to. *Berg*, 147 Wn.2d at 942-43. The Court found that the prohibition was reasonably necessary to protect children, including his younger biological daughter, because Berg was acting as the victim's parent when the abuse occurred. *Id.*

In *State v. Corbett*, 158 Wn.App. 576, 242 P.3d 52 (2010), the victim lived with the defendant as his stepdaughter; the defendant abused his role as her parent by sexually abusing the victim while she was in his care. On appeal, the Court affirmed the trial court's no-contact order with

the defendant's biological children because "of his history of using the trust established in a parental role to satisfy his own prurient desire to sexually abuse minor children." *Id.* (citing *Berg, supra* at 943-44).

Here, D.I.A. was legally Robb's stepdaughter, and by every person's testimony, including Robb's, he treated her like his own child, loved her like his own child, felt about her as he would his own child. He used and abused his parenting role in raping D.I.A. There is no evidence to show pedophiles' interests are solely gender-specific. By evidence at trial, Robb stated that D.I.A. was a physically little girl. A man does not rape and molest a child because she reminds him of a woman, but for many other deviant desires that may not contain themselves to female children. The court had legitimate concerns for the safety of all children, not just female children. The court has even more legitimate concerns for the safety of all children who may find themselves in Robb's care, such as his biological children. The trial court's prohibition against Robb having contact with all minors is reasonably legitimate and supported by case law. This Court should affirm the trial court's imposition of this crime-related prohibition.

VI. Appellate costs are appropriate in this case if the State substantially prevails.

Robb argues under *State v. Sinclair*, 72102-0-I, 2016 WL 393719 (Wash. Ct. App. Jan. 27, 2016), that this Court should not impose any appellate costs if the State substantially prevails on this appeal as he is indigent.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn.App. 342, 989 P.2d 583 (1999). The award of appellate costs to a prevailing party is within the discretion of the appellate court. *Sinclair, supra* at 2-3; *see* RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). However, the appropriate time to challenge the imposition of appellate costs should be when and only if the State seeks to collect the costs. *See Blank*, 131 Wn.2d at 242; *State v. Smits*, 152 Wn.App. 514, 216 P.3d 1097 (2009) (citing *State v. Baldwin*, 63 Wn.App. 303, 310-11, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *Baldwin*, at 311; *see also State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the

time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." *Blank*, 131 Wn.2d at 241–242. *See also State v. Wright*, 97 Wn. App. 382, 965 P.2d 411 (1999). The procedure created by Division I in *Sinclair, supra* at 5, prematurely raises an issue that is not yet before the Court. Robb could argue at the point in time when and if the State substantially prevails and chooses to file a cost bill.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel." Obviously, all these defendants have been found indigent by the court. Under the defendant's argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Court indicated that trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as *Sinclair* points out at p. 5, the Legislature did not include such a provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." *See* RCW 10.73.160(4).

Certainly, appellate courts should also take into account a defendant's financial circumstances before exercising its discretion. The record below showed that Robb had a job until he was incarcerated for this offense. RP 554-56. There is no reason to believe Robb will not be able to continue his employment after release from prison.

In this case, the State has yet to "substantially prevail" and has not submitted a cost bill. Robb has not asserted that he cannot or will never be able to pay appellate costs. The record below would suggest otherwise. But the State respectfully requests this Court wait until the cost issue is ripe, if it ever becomes so, before ruling on this issue.

CONCLUSION

For the reasons discussed above, Robb's conviction for Rape of a Child in the Second Degree should be affirmed.

DATED this 11th day of April 2016.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
RACHAEL R. PROBSTFELD, WSBA #37878
Senior Deputy Prosecuting Attorney
OID# 91127

CLARK COUNTY PROSECUTOR

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